

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and	)	RM - 11293
Policies Governing Pole Attachments	)	RM - 11303
)	
)	

**REPLY COMMENTS OF
FLORIDA POWER & LIGHT, TAMPA ELECTRIC,
AND PROGRESS ENERGY FLORIDA**

**COUNSEL FOR FLORIDA
POWER & LIGHT COMPANY,
TAMPA ELECTRIC COMPANY,
AND PROGRESS ENERGY
FLORIDA, INC.**

Eric B. Langley
Thomas V. Burch
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-4644
T: (205) 251-8100
F: (205) 226-8799

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Florida Power & Light Company (“FPL”), Tampa Electric Company (“TECO”), and Progress Energy Florida (“PEF”) (collectively, the “Florida IOUs”) respectfully file these reply comments in connection with the above-referenced docket.¹ These reply comments focus on three general topics raised in the NPRM and subsequently addressed in the initial comments by various interested parties:

- The dangers and inequities presented by the new proposed pole access rules;
- The insufficient legal and factual basis for the Commission to unravel joint use relationships between ILECs and electric utilities; and
- The unification of pole attachment rates paid by CATV and CLEC broadband providers.

These reply comments are organized by *issue* (as opposed to being organized by *commenter*), but also address certain specific issues raised by individual commenters.

I. INTRODUCTION AND SUMMARY.

The NPRM sought comment “on practices of attachers that have the potential to adversely impact the safety and reliability of an integral component of our nation’s critical infrastructure, our electric power system.”² Many CATV and CLEC attachers responded to the Commission’s request by downplaying the adverse impacts of their attachment practices and arguing that electric utilities unnecessarily delay the deployment of attachers’ services. The attachers then asked the Commission to adopt rules of general applicability that would eliminate utilities’ discretion to deny access under Section 224(f)(2) and would require the Commission to micromanage safety, reliability, and engineering issues on all pole networks. The Florida IOUs respectfully ask the Commission to decline the invitation – as it has in the past – to adopt such

¹ PEF also is submitting comments through its holding company, Progress Energy, Inc., but joins in these comments specifically to support the positions on safety and reliability.

² *NPRM*, 22 FCC Rcd 20195, ¶ 38 (Nov. 20, 2007).

rules because matters of safety and reliability are inherently state-specific and, in many cases, utility-specific. The attachers' proposed rules would elevate speed-to-market over safety and reliability and, if adopted, would have a significant negative impact on the Florida IOUs' ability to meet their obligations under the Florida Public Service Commission's Storm Hardening Proceedings.

The NPRM also sought comment on whether the Commission should favor ILEC pole attachments on electric utility poles with the rate protections of Section 224(b). In response, ILECs urged their "newly discovered" interpretation of the Act. This interpretation is contrary to Congressional intent behind the Act, and contrary to Section 224's explicit exclusion of ILECs. Furthermore, ILECs provided no hard data showing that their relationships with electric utilities have changed in any significant way since 1996. To the extent those relationships have changed (for example, with respect to relative pole ownership), those changes are due to ILECs' voluntary business decisions. Moreover, to the extent there is any distortion of competition between ILECs, CLECs, and CATVs – which is the main justification given by ILECs for including themselves within the protections of Section 224 – it is only because CATVs and CLECs pay unfairly low access rates that are not reflective of market forces. The solution for leveling the playing field between these parties is to raise the rates paid by CATV and CLECs. The solution is *not* to disturb the sophisticated, varied, nearly hundred-year-old infrastructure cost sharing relationships between ILECs and electric utilities.

Finally, the Florida IOUs reiterate their support of the NPRM's tentative conclusion that all CATV and CLEC attachments used to provide broadband services should be subject to the same rate. Particularly in this era of indistinguishable services offered by CATVs and CLECs, identical attachments offering identical services should pay identical rates. The Florida IOUs ask

the Commission to calculate that rate using a modified telecom formula (as urged in the Florida IOUs' initial comments). Section 224(e) requires this result because it obligates telecommunications carriers (which may also happen to provide broadband services) to pay the telecom rate for their attachments. Although the telecom rate itself is unfairly low (because it is based on historical costs and because it forces pole owners to bear the majority of costs attributable to space that is of equal benefit to all attachers), it is the lesser of two evils. The telecom rate, at least, allocates common space more equally than the cable rate. In fact, Comcast's own economic expert, Patricia Kravtin, has endorsed the telecom rate in prior pole attachment testimony before the Commission.³

II. THE NEW ACCESS RULES URGED BY CATVS AND CLECS ARE IMPRACTICAL AND WOULD COMPROMISE THE SAFETY AND RELIABILITY OF THE ELECTRIC DISTRIBUTION SYSTEM.

A. The Commission should not adopt a "one size fits all" approach to safety and reliability standards.

Fibertech asked the Commission in its initial comments to "codify standard practices" for pole access, and Time Warner Telecom similarly asked the Commission to adopt "national rules governing the terms and conditions for obtaining and maintaining access to poles."⁴ The Florida IOUs respectfully ask the Commission not to adopt uniform standards. Matters of safety, reliability, and engineering are best addressed by individual utility standards in concert with a utility's state regulatory commission. The Florida Storm Hardening Proceedings are a good example of a state's exercise of authority over these issues and the potential conflict that would exist if the Commission adopted uniform rules applicable to all utilities.

³ See *infra* Section IV(A) at p. 20.

⁴ See Initial Comments of Fibertech Networks, LLC and Kentucky Datalink, Inc. at p. i, 4; Initial Comments of Time Warner Telecom, Inc., One Communications Corp., and Comptel at p. 14.

After the hurricane seasons in 2004 and 2005, the Florida Public Service Commission (“FPSC”) initiated a rulemaking proceeding designed to improve Florida’s electric infrastructure and protect it from future storms. Specifically, the purpose of the proceeding was “to adopt distribution construction standards that are more stringent than the minimum safety requirements of the National Electric Safety Code.”⁵ After two years of workshops, rule development, and hearings (in which AT&T, Verizon, Embarq, Time Warner Telecom, and the Florida Cable Telecommunications Association participated),⁶ the FPSC approved the Florida IOUs’ Storm Hardening Plans in December 2007. Given that the Storm Hardening Proceedings were designed to strengthen Florida’s network against future storms in the state, the Florida IOUs’ plans take into consideration and address multiple Florida-specific or region-specific issues.

If the Commission now decided to implement rules of general applicability regarding safety and reliability, those rules inevitably would conflict with the Storm Hardening Plans approved by the FPSC and they would negate two years of joint efforts between the Florida IOUs and their attachers. Rules of general applicability cannot address meaningful differences between utilities’ geographic coverage areas or historical practices, and would undermine the Florida IOUs’ ability manage their distribution systems.⁷ Furthermore, adopting such rules would require the Commission to aggressively regulate in an area outside its sphere of expertise. The Florida IOUs respectfully ask the Commission to decline the invitation to adopt such rules.

⁵ Florida Public Service Commission, Order No. PSC-06-0351-PAA-EI at p. 2, Docket No. 060198-EI.

⁶ All attaching entities were invited to participate in the proceedings.

⁷ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16073 (1996) (“In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise.”).

To be clear, the Florida IOUs are not asking the Commission for complete and unfettered discretion in addressing issues of safety and reliability on their pole networks. Rather, the Florida IOUs simply are asking the Commission to continue its current role, which is ensuring on an *ad hoc* basis that the Florida IOUs' safety and reliability standards are applied in a nondiscriminatory fashion. Even ILECs are in agreement with the Florida IOUs on this issue.⁸

Fibertech's request to "codify" prior complaint proceeding decisions is of particular concern. Complaint proceeding decisions are supposed to be based on a *fact specific* record. The facts in one case may differ from the facts in another to such a degree that a different holding is warranted. This is the essence of an adjudicated proceeding. Attachers are free to continue arguing that complaint proceeding decisions are authoritative but electric utilities should remain free to explain why they are distinguishable.

B. Problems with specific safety and reliability issues raised in the attachers' initial comments.

1. Unauthorized attachments

Unauthorized attachments are safety and reliability problems on the Florida IOUs' pole networks because unauthorized attachments deprive the Florida IOUs of the opportunity to pre-engineer their poles for the new attachments.⁹ The CATV and CLEC attachers appear to concede that unauthorized attachments exist, but argue that the problem is one of degree.¹⁰ In their initial comments, these attachers either glossed over or completely ignored the *volume* of

⁸ See, e.g., Initial Comments of Verizon at pp. 18-20; Initial Comments of Qwest Communications International, Inc. at pp. 6-7. Although broadband deployment is, indeed, important, it is not as important as the safety and reliability of critical infrastructure networks.

⁹ Overlashing by attachers creates similar problems on the Florida IOUs pole networks. Without pre-notification of overloading, the Florida IOUs cannot pre-engineer their poles to accommodate the additional load.

¹⁰ See Initial Comments of Time Warner Cable, Inc. at pp. 55-56.

unauthorized attachments on electric utilities' poles. Time Warner Cable, for example, stated in its initial comments that utilities' concerns over unauthorized attachments are "without basis" and that utilities' unauthorized attachment claims are largely a byproduct of "shoddy record keeping."¹¹

The Florida IOUs found over 61,000 unauthorized attachments on their poles during their most recent pole audits.¹² The sheer size of this number alone shows that "record keeping" is not the cause of the problem. Moreover, actual discrepancies in record keeping (which are, indeed, possible when dealing with tens of thousands of attachments) are typically resolved by common "forgiveness" thresholds in pole attachment agreements.¹³ This is not a passing concern, either. The FPSC, recognizing the safety and reliability problems presented by unauthorized attachments, requires annual reporting of unauthorized attachments detected through system audits.

If the Commission truly wants to reduce the number of unauthorized attachments, it must allow utilities to enforce contractual penalty provisions. The Commission must also move away from the prevailing "economic loss only" paradigm, which creates a disincentive to follow

¹¹ *Id.*

¹² This figure actually is much higher than 61,000 because FPL's most recent audit (in 2007) counted only 20% of the company's poles. Even counting only 20% of their poles, FPL still found 1,798 unauthorized attachments. PEF and TECO perform full audits every few years. PEF's most recent pole audit took place in 2006. TECO's most recent audit took place in 2001. *See* Initial Comments of Florida IOUs at p. 12.

¹³ PEF's pole attachment agreements require, upon discovery of unauthorized attachments: (1) payments of back rent, plus interest, for five years or since the previous audit (whichever is shorter); and (2) a \$25 fee for each unauthorized attachment in excess of ten attachments or 2% of the last verified total number of attachments (whichever is greater). This 2% "forgiveness" provision prevents attachers from paying a penalty charge merely because of minor record keeping discrepancies. *See* Initial Comments of the Florida IOUs at p. 12.

permitting procedures.¹⁴ For the Florida IOUs, specifically, the current lack of meaningful enforcement mechanisms against unauthorized attachments negatively impacts their ability to comply with the FPSC Storm Hardening mandates such as pre-attachment strength and loading analyses. The Florida IOUs respectfully ask the Commission to distance itself from an “economic loss only” paradigm, and allow utilities to enforce the penalty provisions in their attachment agreements.¹⁵

2. Safety violations

Time Warner Cable claimed in its initial comments that utilities are making “trumped up” safety allegations and that utilities themselves are responsible for the majority of safety violations on their pole networks.¹⁶ Comcast’s initial comments went to great lengths to establish that an electric utility “might” have caused a violation on a specific pole.¹⁷ But the fact that electric utilities may cause violations is a diversion from the real issue at stake in the NPRM: safety violations caused by Section 224 attachers (not by utilities).¹⁸ An electric utility’s own safety violations are outside the Commission’s jurisdiction, anyway. While the Commission’s jurisdiction might reach these issues in the context of whether a utility “reasonably” assigned blame for a given violation (and cost of correction) to an attacher, the Commission undoubtedly lacks plenary jurisdiction over the construction practices of electric utilities. The Florida IOUs

¹⁴ None of the attachers offered any support for the current “economic loss only” paradigm in their initial comments.

¹⁵ In addition to clinging to an “economic loss only” paradigm, attachers also seek to suppress the economic loss by capping interest on unauthorized attachments at the IRS underpayment rate. *See, e.g.*, Initial Comments of Knology, Inc. at p. 3. The Commission should reject these efforts. Contractual interest rates should be negotiated by the parties, and limited only by state usury laws.

¹⁶ *See* Initial Comments of Time Warner Cable, Inc. at pp. 53-54.

¹⁷ *See* Initial Comments of Comcast Corporation at Exhibit 3, pp. 1-3.

¹⁸ *NPRM*, ¶ 38.

respectfully ask the Commission to disregard the attachers' attempted diversions, and to continue its inquiry into the prevalence of *attachers'* improper attachment practices.

3. Temporary attachments

Current Group, LLC and Fibertech Networks, LLC asked the Commission to require utilities to allow “temporary attachments.”¹⁹ The Florida IOUs ask the Commission to deny this request.

Requiring utilities to accept temporary attachments would run afoul of the right to deny access for reasons of safety, reliability, insufficient capacity, and generally applicable engineering purposes under Section 224(f)(2). The Florida IOUs, for example, do not allow temporary attachments because they cannot pre-engineer their poles in advance of the attachments and because the grade of construction used for temporary attachments does not account for loading on the pole.²⁰ Given that the FPSC's Storm Hardening Proceedings emphasized pre-engineering as a means for strengthening Florida's distribution systems, and given that temporary attachments increase stress on a pole without pre-engineering to account for the additional stress, forcing the Florida IOUs to accept temporary attachments would conflict with the Florida IOUs' Storm Hardening obligations. Moreover, once a temporary attachment is made, the attacher has little motivation to proceed with the sometimes-costly make-ready

¹⁹ See Initial Comments of Current Group, LLC at pp. 6-7; Initial Comments of Fibertech Networks, LLC at pp. 27-28.

²⁰ See Second Declaration of Thomas J. Kennedy (“Second Kennedy Decl.”) at ¶ 3, attached hereto as Exhibit 1; Second Declaration of Scott Freeburn (“Second Freeburn Decl.”) at ¶ 3, attached hereto as Exhibit 2. Clearances cannot be waived for temporary attachments, except in emergency situations. See, e.g., National Electric Safety Code Handbook, Section 1, Rule 014 (6th ed. 2006) (stating that “the safety afforded by traffic signals and highway lighting during emergency times is often so great that it is worth the short-lived clearance changes to decrease the time required to reinstate these services”).

required to make the temporary attachment permanent.²¹ This means utilities are stuck with low-grade construction attachments on their poles until the attachers find time to make the attachments permanent or until the utilities are forced to do so themselves.²²

4. Records access

T-Mobile USA, Inc., in its initial comments, asked the Commission to require utilities to post maps of distribution facilities on the internet to eliminate “frequent and unreasonable delays in negotiating pole attachment agreements.”²³ This would be a potentially disastrous requirement. Although any party could conceivably map the system over time (assuming they knew what they were looking for), the consolidation of this data in one easy-to-access location increases the risk of vandalism or terrorism to electric utilities’ distribution systems.²⁴ The Florida IOUs do not even allow state or local governments to have access to system-wide data.²⁵ When maps of certain portions of the system are provided to third-parties, these third-parties are required to execute nondisclosure agreements.²⁶

²¹ See Second Kennedy Decl. at ¶ 3.

²² As Pat Simpson, host of HGTV’s *Fix-It-Up* and *Before and After*, often says: “Fix it right the first time. There is nothing more permanent than something temporary.”

²³ See Initial Comments of T-Mobile USA, Inc. at p. 7. T-Mobile also stated that it has been negotiating a pole attachment agreement with FPL since 2004 and implied that FPL has caused delays in the negotiation process. The reason for the delay is that T-Mobile, despite numerous requests from FPL, has not yet provided the antenna configuration it proposes to use. See Second Kennedy Decl. at ¶ 5.

²⁴ This same concern may not exist, or perhaps it exists to a lesser degree, for ILEC networks (as opposed to electric utility networks). There is an important distinction in the sensitivity of this information, for sure.

²⁵ See Second Declaration of Kristina Angiulli (“Second Angiulli Decl.”) at ¶ 3, attached hereto as Exhibit 3.

²⁶ See Second Angiulli Decl. at ¶ 3; Second Freeburn Decl. at ¶ 6.

5. Boxing and bracketing

As mentioned in their initial comments, the Florida IOUs do not allow boxing and bracketing because of the negative impact these practices can have on the safety and reliability of a pole network. Boxing, in particular, limits the use of climbing as a means of maintenance and repair. Time Warner Telecom suggested in its initial comments that this problem is negated by “bucket truck accessibility.”²⁷ “Bucket truck accessibility” is not the solution, however, because even where pole lines can be accessed by bucket truck, there are still many occasions where climbing provides the best and most efficient method of access.²⁸ But even ignoring the practical problems presented by boxing, requiring utilities to allow this practice would be tantamount to the Commission telling electric utilities what specific maintenance techniques (climbing vs. bucket truck) they can use on any given pole. This is not the proper role of the Commission.

Bracketing also limits climbing as a means of maintenance and repair, and it slows down pole change outs, complicates transfers, and increases maintenance costs.²⁹ Further, use of standoff brackets in the communications space can impair, and make more dangerous, the use of bucket trucks because of the horizontal barrier the brackets create.³⁰ A standoff bracket placed close to the communication worker safety space will impede a lineman from bringing the bucket close to the pole when working in the lower supply space around transformers and electrified secondary conductor.³¹ The lineman will be faced with less safe and more time consuming choices to accomplish his or her work, such as: (1) placing the bucket above the bracket and

²⁷ See Initial Comments of Time Warner Telecom, Inc., One Communications Corp., and Comptel at p. 24.

²⁸ See Initial Comments of the Florida IOUs at p. 19.

²⁹ *Id.*

³⁰ See Second Kennedy Decl. at ¶ 6.

³¹ *Id.*

reaching down to do his or her work; (2) keeping the bucket away from the pole and reaching over the side of the bucket at least the length of the bracket to the pole; or (3) climbing the pole, which is also impeded by the bracket.³² A bracket, wherever it is placed, will also impede on the angle of attack the boom of the bucket takes to place the lineman close to the pole.³³ The lineman would have to deal with three dimensions of obstacles instead of two and will have less choices of where to park the truck (*i.e.*, closer to the middle of the street) to effectively reach the electric facilities.³⁴ The photographs of bracketing arms attached to the Second Declaration of Kristina Angiulli (attached as Exhibit 3) show examples of unauthorized bracketing on TECO's system.³⁵ As the pictures reveal, these are not minor impediments. They are major obstacles.

C. Specific impracticalities of the requests raised in the attachers' initial comments.

1. Make-ready timelines

Several attachers (*e.g.*, Fibertech and Kentucky Data Link) requested uniform make-ready timelines in their initial comments, but they failed to provide any substantive evidence showing that existing make-ready timelines are truly creating widespread deployment problems.³⁶ From the Florida IOUs' perspective, make-ready timelines never have been a significant issue. The Florida IOUs have been able to reach mutually agreeable make-ready resolution based on the circumstances of a given project.³⁷ The real "delay" problem the Florida IOUs face in make-ready projects is attachers' failure to make timely transfers of their

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See Second Angiulli Decl. at ¶ 6.

³⁶ See Initial Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc. at p. 21.

³⁷ See Second Kennedy Decl. at ¶ 4; Second Freeburn Decl. at ¶ 4.

attachments to a new pole, notwithstanding notification through NJUNS. PEF, for example, currently has more than 13,000 stub poles (double wood) in its service territory because of attachers' failure to transfer.³⁸

Adopting rigid timelines would elevate speed-to-market over safety and reliability, and would be contrary to the Commission's own notice rules. As set forth in the Florida IOUs' initial comments, the proposed make-ready timelines may be manageable on small jobs. But not all make-ready jobs are small. Further, the Commission's own rules stand in the way of meeting the aggressive make-ready deadlines proposed. Section 1.1403(c)(1) of the Commission's rules requires utilities to provide 60 days notice to an attacher before moving or removing the attacher's facilities (which is very common in make-ready).³⁹ If an existing attacher (who may be a competitor of the prospective attacher) is unwilling to move itself and unwilling to waive the 60-day notice requirement, there are portions of a make-ready job that cannot even *begin* within 60 days (which makes a 25-day or 45-day make-ready deadline, as requested by Fibertech, impossible to meet).

2. Sign and sue rule

The NPRM sought comment on whether the Commission "should adopt some contours to the [sign and sue] rule, such as time-frames for raising written concerns about a provision of a pole attachment agreement."⁴⁰ The Florida IOUs encourage the Commission to review the efficacy and fairness of this rule, notwithstanding several attachers' pleas to the contrary.⁴¹

³⁸ See Second Freeburn Decl. at ¶ 4.

³⁹ See 47 C.F.R. § 1.1403(c)(1).

⁴⁰ NPRM, ¶ 37 n. 110.

⁴¹ See, e.g., Initial Comments of Comcast Corporation at p. 42; Initial Comments of Knology, Inc. at pp. 10-12; Initial Comments of the National Cable & Telecommunications Association at pp. 22-24.

The Commission's sign and sue rule allows attachers to make an illusory commitment to a bargain until they decide to abandon the bargain in search of a better deal. The rule has created the unsavory result of Commission-sanctioned promissory fraud,⁴² and it places utilities in a commercially tenuous "wait and see" position, never knowing when any given attacher may decide that it wants to scrap certain terms of an existing, bargained-for agreement. This is especially true given that an attacher's view of what is "unreasonable" may vary with changes in the attacher's management team.

Perhaps the most egregious part of the sign and sue rule is that it allows attachers to "cherry pick" contractual provisions that they would like to disavow, while not extending the same privilege to utilities. In other words, when an attacher successfully disavows (through the sign and sue process) certain provisions that may not be in the attacher's favor, utilities are stuck with provisions that may not be in their favor, even if the utilities "gave in" on those provisions in order to have the attachers "give in" on the provisions that have just been disavowed. Thus, the sign and sue rule allows attachers to fraudulently induce utilities into agreeing to certain unfavorable provisions (by themselves agreeing to other unfavorable provisions), knowing full-well they intend to disavow certain provisions at some future, unilaterally convenient date.

In Florida, parties seeking to avoid the enforcement of contractual terms must show that the contract itself is both procedurally and substantively unconscionable.⁴³ The procedural

⁴² In Florida, promissory fraud is the equivalent of fraudulent inducement. *See Htp, Ltd. v. Lineas Aereas Costarricenses*, 685 So. 2d 1238, 1240 (Fla. 1996) ("Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely--which normally would constitute grounds for invoking the economic loss doctrine--but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior.") (citations omitted).

⁴³ *See, e.g., Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999).

unconscionability test focuses on whether the party had a “realistic opportunity to bargain.”⁴⁴ The substantive unconscionability test focuses on whether the terms of the contract are “reasonable” or “fair.”⁴⁵ These tests are well-defined under Florida law and they allow contracting parties to know, on the front end, what standards are expected during the negotiating process. Because these tests are well-defined, the Florida IOUs respectfully ask the Commission to require attaching parties to challenge the terms of pole attachment agreements in state court under state laws of unconscionability. This would clarify the rules or standards that electric utilities must follow during pole attachment negotiations, and would decrease the attachers’ current abuse of the sign and sue process.

If the Commission intends to continue allowing attachers to use the sign and sue rule, the Florida IOUs ask that the Commission require attachers to show that the contract *as a whole* was negotiated in bad faith, instead of allowing attachers to cherry pick unfavorable provisions. If attachers make this showing, their remedy should be a re-negotiation of the entire contract.

III. THE PARADIGM SHIFT PROPOSED BY ILECS IS NOT SUPPORTED BY THE LAW OR THE FACTS.

Congress defined ILECs as “utilities” under the 1996 Act, not as “attachers.”⁴⁶ But now ILECs are claiming, twelve years later, that Congress actually intended for ILECs to have “attacher” rights to regulated rates. This newly discovered interpretation of the Act is contrary to the explicit language of Section 224, the Congressional intent behind the Act, and the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See* 47 U.S.C. § 224(a)(1); *see also* 47 U.S.C. § 224(a)(5) (“For purposes of this section, the term ‘telecommunications carrier’ does not include any incumbent local exchange carrier...”); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6781 (1998) (“The 1996 Act ... specifically excluded incumbent local exchange carriers (‘ILECs’) from the definition of telecommunications carriers with rights as pole attachers.”).

Commission's interpretations of the Act over the last twelve years. Further, as recognized by the Coalition for Concerned Utilities, the ILECs' strained interpretation, if adopted, would result in a number of regulatory oddities, including giving the Commission jurisdiction to regulate ILECs' attachments on their *own* poles.⁴⁷

A. The ILECs' initial comments mischaracterized the status of relationships between ILECs and electric utilities.

Even looking past the law (which the Commission cannot do), ILECs have not made a credible or compelling factual case for their proposed paradigm shift. The ILECs' main justification for why they should receive regulated rates is that there has been a fundamental change in bargaining power between ILECs and electric utilities over the last decade. The ILECs contend this "change" in bargaining power is the product of disparity in relative pole ownership.⁴⁸ But the changes in relative pole ownership between ILECs and the Florida IOUs since 1996 have been minimal to non-existent. As set forth in FPL's and TECO's initial comments on ILECs and pole attachment rates, the change in relative pole ownership between FPL and its ILEC partners has averaged less than 1/2% per year since 1994; and, the relative pole ownership between TECO and its largest ILEC attacher has actually moved *closer* to parity (meaning the ILEC now owns more poles) since the inception of their joint use agreement.⁴⁹ As a more specific example, in 1973 AT&T owned 40.6% of the joint use wood poles in FPL's territory. Thirty-five years later, AT&T's ownership has declined by only 3.5%.⁵⁰

⁴⁷ See Initial Comments of the Coalition of Concerned Utilities at p. 64.

⁴⁸ See, e.g., Initial Comments of AT&T, Inc. at p. 4.

⁴⁹ See Initial Comments of Florida Power & Light Company and Tampa Electric Company at pp. 7-8.

⁵⁰ See Second Kennedy Decl. at ¶ 8.

Moreover, ILECs still own something that electric utilities need – poles. FPL currently has facilities installed on 637,475 ILEC poles. TECO currently has facilities installed on 13,102 ILEC poles. This provides ILECs with significant bargaining power when negotiating to attach to electric utilities’ pole networks.⁵¹

To the extent there has been a perceived change in bargaining power between ILECs and electric utilities due to pole ownership imbalance, ILECs have the ability to regain any lost power through pole buy backs or through setting new poles and replacement poles. FPL and AT&T, for example, have used pole sales throughout the years (since at least 1940) to maintain or move closer to parity.⁵² Sometimes, though, ILECs refuse to buy back poles, or when presented with opportunities, insist on purchase prices that do not reflect economic realities.⁵³ For example, in 2003, TECO and Verizon discussed a pole buy back to move Verizon closer to parity, but the discussions never progressed because Verizon wanted the benefit of purchasing depreciated poles without the burden of the cost of new poles.⁵⁴

B. The ILECs’ focus on pole usage is misplaced and inaccurate.

AT&T and other ILEC attachers stated in their initial comments that, “over the years,” electric utilities have required more space on poles while ILECs have required less.⁵⁵ The ILECs’ focus on pole usage is misplaced, as it neglects the foundational principle of the joint use agreements between ILECs and electric utilities: infrastructure cost sharing through avoiding

⁵¹ The notion that fewer poles means less bargaining power has *never* been true, since many of the oldest joint use agreements contemplated that ILECs would own less than 50% of jointly used poles.

⁵² See Second Kennedy Decl. at ¶ 8.

⁵³ See Second Angiulli Decl. at ¶ 4. It defeats the premises of joint use if one party is buying back into parity only at depreciated, cut rates.

⁵⁴ See *id.*

⁵⁵ See, e.g., Initial Comments of AT&T, Inc. at 3.

duplication of pole networks. The ILECs' "usage" allegations are inaccurate and overblown, anyway. For example, while true that a single ILEC attachment may (in some instances) occupy only one foot of space, this is the exception. If an ILEC attaches above the lowest point available to it on a pole (for example, for purposes of ensuring mid-span clearance), it constructively is occupying the space beneath even if the attachment itself occupies only one foot at the pole.⁵⁶ Many ILECs have multiple attachments, often leaving their insulated copper lines in place when adding a new fiber wire.⁵⁷ Copper lines have greater sag than fiber, meaning that one copper line constructively could occupy significant space beneath the attachment depending on the span between poles.⁵⁸

But pole usage and space allocation data are beside the point. The concept at issue under joint use agreements is relative pole ownership, not relative use of pole space. The costs that must be shared by the parties under those agreements are the same regardless of the number of attachments made by ILECs and regardless of whether ILECs are occupying half, double, or triple their allocated space.⁵⁹

⁵⁶ See Second Kennedy Decl. at ¶ 7. The NESC encourages utilities to create a uniform order of attachment to facilitate identification of attachers. See National Electric Safety Code, Rules 220(A)(D),(E). The Florida IOUs' order of attachment is (from bottom to top) as follows: ILEC-CATV-CLEC-Electric Utility. See generally Belcore, Blue Book – Manual of Construction Procedures, at pp. 3-3, 3-5 (Issue 3, December 1998) (showing that telephone attachments are made at the lowest point on a pole).

⁵⁷ AT&T's initial comments suggested that they have been *replacing* copper wire with fiber, but their ARMIS reports do not support this allegation. In every year since 1996, AT&T has reported an *increase* in aerial insulated copper wire within the State of Florida (and nationwide for that matter). See Reply Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power at p. 11. The conclusion from AT&T's own data is undeniable: they are "using" more of the pole in terms of vertical and/or loading capacity – not less.

⁵⁸ See Second Kennedy Decl. at ¶ 7.

⁵⁹ See *id.*

C. The ILECs offered misleading cost and rate data.

The ILECs' focus on "pole attachment rates" is misplaced because they could eliminate payment of rates entirely by moving into contractual parity. Aside from this, the rate comparison data provided by ILECs are misleading. For example, the United States Telecom Association stated that ILECs sometimes are forced to pay "more than 8 times the pole attachment rate paid by cable companies for attachments used to deliver competing broadband services."⁶⁰ This statement fails to address two significant facts. First, ILECs do not pay "attachment rates." They pay "adjustment rates" that are negotiated to proportionally allocate the cost of owning distribution networks. Second, the "rates" under joint use agreements between ILECs and electric utilities are typically structured in one of two ways: either (a) both parties pay rates to the other for all poles to which they have facilities attached; or (b) the party out of parity pays a rate to the other for only the number of poles "out of parity." These two allocation methods yield very different "rates," even though the same costs are being allocated.

For example, suppose a contractual parity ratio of 50/50, and an adjustment rate of \$50 for the party out of parity. This really means each party constructively pays the other a "rate" of \$25/pole. To illustrate this point, further suppose a shared network of 1,000 joint use poles, with the electric utility owning 600 poles and the ILEC owning 400 poles. The ILEC would be 100 poles out of parity and would pay an annual adjustment rate totaling \$5,000. This is the same net result as if each party had paid the other \$25/pole (which would mean the electric utility paid the ILEC \$10,000 and the ILEC paid the electric utility \$15,000).

If, on the other hand, the \$50 "rate" is paid by the ILEC to the electric utility for each pole to which it is attached (versus only those poles out of parity), then the important question

⁶⁰ See Initial Comments of the USTA at p. 2.

becomes: what does the electric utility pay the ILEC? Many joint use agreements (in which both parties pay the other) require the electric utility to pay a higher rate to the ILEC. This issue is completely ignored in *every* set of comments filed by the ILECs. ILECs ignore this important issue because it, alone, severely undermines the comparison between joint use adjustment rates and regulated pole attachment rental rates.

AT&T also claims it must pay for concrete and taller poles even when those poles provide no measurable benefit to AT&T.⁶¹ That is incorrect. FPL and TECO pay for any cost differences on the front end when they need to set something other than the normal joint use pole for its own service needs.⁶² Furthermore, the cost basis for FPL's adjustment rates, for example, include only those poles most commonly used for joint use purposes.⁶³

If anyone is getting shortchanged in the current joint use relationship, it most certainly is the electric utility. ILECs have determined it is cheaper to "rent" pole space than it is to own a pole network. AT&T itself offered testimony in various state regulatory proceedings during the mid-1990s that its cost of providing one foot of space on a pole exceeded \$20.⁶⁴ If adjusted according to the Handy-Whitman Index, this would amount to approximately \$27 today. Yet, AT&T argues in 2008 that it should pay an amount roughly equivalent to the cable rate. If ILECs are not willing to return to parity, the Commission should not step in and favor them with a subsidized rate (some electric utilities would argue that current adjustment rates already are subsidized). This would allow ILECs to "have their cake and eat it too" while requiring electric utilities to continue baking cakes for the ILECs' benefit.

⁶¹ See Initial Comments of AT&T, Inc. at p. 6.

⁶² See Second Kennedy Decl. at ¶ 8; Second Angiulli Decl. at ¶ 5.

⁶³ See Second Kennedy Decl. at ¶ 8.

⁶⁴ See Declaration of Wil Arnett, ¶ 29, Attached as Exhibit 4 to the Reply Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power.

IV. ANY UNIFICATION OF THE RATE FOR CATV AND CLEC BROADBAND ATTACHMENTS MUST BE AT LEAST THE TELECOM RATE.

A. If the Commission is interested in establishing a unified broadband rate, there is only one way to do it under the Act.

Virtually all commenters support the unification of broadband attachment rates. This makes sense for CATVs and CLECs since they offer indistinguishable services over identical attachments. There is disagreement, however, on which rate to apply. Most CATV and CLEC attachers urge the Commission to unify the rate at the current cable rate. But this will not work under the existing Pole Attachment Act. The solution for unifying the broadband rate is to move the rate paid by CATVs up to the telecom rate, not to move the rate paid by CLECs down. Section 224(e) requires this result. Specifically, Section 224(e) states that the telecom rate applies to “pole attachments used by telecommunications carriers to provide telecommunications services.”⁶⁵ Thus, Section 224(e) obligates telecom carriers to pay the telecom rate regardless of what other services they may be providing through their attachments. Charging anything less than the telecom rate for CATV broadband attachments would continue to put CLEC broadband providers at a competitive disadvantage.

Time Warner Telecom and other CLEC commenters seem to accept that the Commission’s flexibility is limited by Section 224(e), since the solution they urge is to manipulate the annual pole cost inputs to the telecom formula so that the telecom rate and cable rate end up “looking alike.” This “solution” would completely undermine *any* credibility in the annual pole cost portion of the Commission’s formula. There is no way around one simple fact: Congress intended for telecom attachers to pay a higher rate than cable-only attachments.

⁶⁵ See 47 U.S.C. § 224(e).

Unifying the rate by using the telecom formula would not be a “broadband tax” on CATV and CLECs, as alleged by attachers.⁶⁶ It would actually continue a “broadband subsidy” because the telecom rate does not fully compensate electric utilities for the costs of building and maintaining their distribution networks. Nevertheless, the telecom rate is closer to fair than the cable rate because it at least allocates the cost of providing 2/3 of the common pole space equally to all attachers.⁶⁷ One of the experts offered by Comcast in its initial comments, Patricia Kravtin, even admitted on cross examination in a prior pole attachment rate case that the “telecom formula reflects economically appropriate cost allocation principles” and that the “telecommunications formula is consistent with cost causation principles.”⁶⁸

Finally, the fact that the telecom rate is higher than the cable rate is not a historical accident, as Comcast suggests.⁶⁹ The telecom rate does not equal the cable rate until the average

⁶⁶ See, e.g., Initial Comments of Comcast Corporation at pp. 1, 30; Initial Comments of National Cable & Telecommunications Association at pp. ii, 17-21; Initial Comments of the State Cable Associations at p. 5. Referring to any embedded cost-based allocation as some sort of “tax” is as obnoxious as it is insincere, coming from entities who have *never* faced the costs and consequences of infrastructure ownership.

⁶⁷ Congress previously stated that unusable space on a pole “is of equal benefit to all entities attaching to the pole.” See House Report No. 104-204, at 92. The 1/3 deduction may have been intended to account for the pole owner’s share of the cost of common space. The Commission, in interpreting the cost allocation parameters of 224(e), originally determined that pole owners were “attaching entities” only if they provided telecommunications services. See *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6802 (1998). However, the Commission reversed field on reconsideration and included pole owners within the definition of “attaching entities.” See *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 16 FCC Rcd 12103, 12133 (2001). On appeal, the D.C. Circuit held only that the Commission’s decision was a reasonable interpretation of an ambiguous statutory term (*Chevron* step two). *Southern Co. Services, Inc. v. FCC*, 313 F.3d 574, 580-81 (D.C. Cir. 2002). This is within the Commission’s power to change.

⁶⁸ See *Florida Cable Telecommunications v. Gulf Power*, EB Docket No. 04-381, Hearing Transcript, Volume 8, pp. 1399:4-7, 1404:12-16 (Federal Communications Commission, April 26, 2006), attached hereto as Exhibit 4.

⁶⁹ See Initial Comments of Comcast Corporation at pp. 19-21.

number of attaching entities reaches *nine*. Yet, the Commission established rebuttable presumptions of three (rural) and five (urban) attaching entities, which yield rates of 151% and 228% of the cable rate, respectively.⁷⁰

B. The Commission should not adopt a rate formula for wireless pole top attachments.

Wireless attachers asked the Commission in their initial comments to assert jurisdiction over wireless pole top attachments and to create a presumption that such attachments are reasonable.⁷¹ As noted in the Florida IOUs' initial comments: (1) the Commission does not have jurisdiction to mandate pole top access; (2) a presumption in favor of pole top attachments would conflict with the Commission's own rules; and (3) pole top attachments create safety and reliability concerns that utilities should be able to take into consideration before deciding whether to allow such attachments.⁷² But in the event the Commission disregards these concerns and exercises jurisdiction over wireless pole top attachments (which it should not), the Florida IOUs respectfully ask the Commission not to apply the unified broadband rate to those attachments. As the NPRM noted, there is only one pole top.⁷³ Make-ready cannot create another. Even if the Commission asserts jurisdiction over wireless pole top attachments, it should not apply any unified broadband rate to them.

V. CONCLUSION

The Florida IOUs respectfully ask the Commission not to adopt any rules of general applicability for safety and reliability issues. If the Commission truly is interested in remedying

⁷⁰ Even these presumptions are at odds with extant conditions. But the presumptions evidence the fact that the Commission never anticipated a ubiquitous collision of the cable and telecom rates.

⁷¹ See Initial Comments of NextG Networks, Inc. at p. 16.

⁷² See Initial Comments of the Florida IOUs at pp. 14-18.

⁷³ NPRM, ¶ 34.

the safety problems caused by the attachment practices of ILECs, CLECs, and CATV, then it should allow electric utilities to enforce their existing attachment and joint use contracts. Anything else will make a bad situation worse, and will jeopardize the Florida IOUs' ability to meet their Storm Hardening obligations.

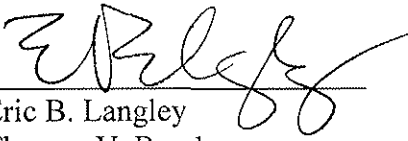
As to whether the Commission can or should assert jurisdiction over ILEC attachments, it cannot and it should not. The relationships between ILECs and electric utilities (which have existed for approximately one hundred years without Commission regulation) are not broken, and do not need regulatory "fixing." The consequences of a paradigm shift would be real and severe. The alleged disparities in rates cited by some ILECs in their initial comments were based on deceptive comparisons (apples and oranges) that were made to appear worse by the unfairly low attachment rates under the Commission rate formulas. These alleged disparities would not appear so great if the Commission adopted a modified telecom formula for CATV and CLEC broadband providers, as urged by the Florida IOUs, EEI, and others in their initial comments. Then, at least, the disparity alleged by ILECs would not be as severe, and the playing field would be more level.

Finally, the Florida IOUs support the Commission's stated preference for a unified broadband rate and ask the Commission to calculate that rate under a modified telecom formula. Section 224(e) requires use of the telecom formula because it obligates telecom carriers to pay the telecom rate, regardless of what other services (such as broadband) they may be offering. Establishing anything less as the "broadband rate" would continue to place CLECs at a competitive disadvantage vis-à-vis CATVs.

The Florida IOUs appreciate the opportunity to comment on these matters of great importance, and look forward to continued involvement in the rulemaking process.

**COUNSEL FOR FLORIDA
POWER & LIGHT COMPANY,
TAMPA ELECTRIC COMPANY,
AND PROGRESS ENERGY
FLORIDA, INC.**

Respectfully submitted,

A handwritten signature in black ink, appearing to read "E. Langley", written over a horizontal line.

Eric B. Langley
Thomas V. Burch
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-4644
T: (205) 251-8100
F: (205) 226-8799

April 22, 2008

EXHIBIT 1

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and)	
Policies Governing Pole Attachments	)	RM-11293
)	
	)	RM-11303

SECOND DECLARATION OF THOMAS J. KENNEDY, P.E.

1. My name is Thomas J. Kennedy. I am a Professional Engineer licensed in the State of Florida. I am currently employed by Florida Power & Light Company ("FPL") as Principal Regulatory Affairs Analyst in the Distribution Business Unit. I am FPL's Professional Engineer responsible for managing Joint Use. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity at FPL.

2. I am the same Thomas J. Kennedy who offered testimony in support of the initial comments submitted by Florida Power & Light Company, Tampa Electric Company, and Progress Energy Florida, Inc. (collectively, the "Florida IOUs") in the above-captioned matter. I offer this testimony in support of the reply comments filed by The Florida IOUs.

3. FPL does not allow "temporary attachments" on its poles for very sound reasons. First, under the NESC, clearance requirements cannot be waived for temporary attachments. The only requirement that can be temporarily waived is the grade of construction.¹ However, construction grade is one of the critical components to FPL's new construction standards and its Storm Hardening Plan which were recently approved by the Florida Public Service Commission.

¹ Rule 014 of the NESC states: "The person responsible for an installation may modify or waive rules in the case of emergency or temporary installations."

A “waiver” of the grade of construction would, in essence, be permission to overload the pole relative to FPL’s approved standards. Additionally, FPL does not allow temporary attachments because attachers, once on the pole, would have little incentive to incur the additional expense to make attachments permanent.

4. During the make-ready process for new attachments, existing attachments often must be rearranged or transferred to a new pole in order to make room for the new attacher. The time required for each make-ready job varies depending on the job’s size and complexity and the other attachers’ willingness to comply. FPL has had no significant issues with negotiating make-ready timelines with its attachers and it rarely receives complaints about the length of time taken to complete a make-ready job. Based on FPL’s dealings with its third-party attachers, make-ready timelines do not seem to be an issue of such concern to warrant regulatory intervention.

5. T-Mobile’s initial comments imply that FPL is the cause of delay in their DAS construction. In fact, T-Mobile has yet to settle on an antenna configuration they will be using that FPL can review for attachment compatibility with FPL’s Storm Hardening requirements, and until recently has not continued negotiations to put an antenna in place. However as this document is being filed, it appears that FPL and T-Mobile are close to reaching an agreement for their DAS deployment.

6. Use of standoff brackets in the communications space can impair (or render dangerous) the use of bucket trucks because of the horizontal barrier. Quite often it is necessary to bring the bucket flush up against the pole so that the lineman will be closer to where he/she needs to work. A standoff bracket placed close to the communication worker safety space will impede a lineman from bringing the bucket close to the pole when working in the lower supply space around transformers and electrified secondary conductor. The lineman will be faced with

less safe and more time consuming choices to accomplish his/her work (which would include restoration of electric service to customer without power). This would entail: 1) Placing the bucket above the bracket, requiring the lineman to reach down to do his/her work; 2) Keeping the bucket away from the pole requiring the lineman to reach over the side of the bucket at least the length of the bracket to the pole; or 3) Climbing the pole, which is also impeded by the bracket. All three choices are less safe and should not be forced upon electric utilities. A bracket, wherever it is placed, impedes the angle of the boom of the bucket must take to place the lineman close to the pole. This causes the lineman to now deal with three dimensions of obstacles instead of two and provides fewer options to park the truck (i.e. closer to the middle of the street) to effectively reach FPL facilities. Additionally quite often two buckets are working on the same pole at the same time, further complicating the work to be performed.

7. Although ILEC attachments sometimes occupy only one foot of space on a pole, this would be the exception and not the rule. Sometimes ILECs attach above the lowest point available to them on the pole, constructively occupying the space beneath. Also, many ILECs have multiple attachments on a pole, sometimes leaving their copper pair lines in place when adding new fiber wires. The copper lines have greater mid-span sag, meaning that even if the attachment occupies only one foot at the pole, it constructively occupies more because it must be placed higher on the pole to account for the increased sag. With that said, the space used by ILECs and FPL on each pole is irrelevant in calculating the adjustment rates paid by the parties under the joint use agreements, because FPL's joint use agreements are associated with sharing infrastructure costs by avoiding duplicate pole networks.

8. When FPL requires a taller pole than a normal joint use pole for its own service needs, FPL installs it or pays the additional costs for that particular pole. If FPL requires a

concrete pole, FPL installs that pole. FPL does not pass those costs along to ILECs. For example in FPL's joint use agreements a normal joint use pole is either 35 feet or 40 feet tall. If FPL requests BellSouth, dba AT&T Florida (AT&T), to install a forty-five foot joint use pole, AT&T would charge FPL the difference between the forty-five foot pole meeting the appropriate construction standards and the normal joint use pole meeting the same construction standards. Furthermore, the costs for the ILECs are the same regardless of the space actually used (even if it exceeds the allocation under the joint use agreement) or the number of attachments it places on a pole. Additionally when the adjustment rate is calculated, FPL only uses the average embedded historical costs associated with 35 and 40 foot wood poles. In 1973 AT&T owned 40.6% of the joint use wood poles in our shared territory. Today, 35 years later and contrary to their claims, that percent ownership has only declined 3.5%. Because FPL and AT&T have placed a high priority on parity, we have put pole installation policies in place and have used pole sales (sale and transfer ownership of poles in place) since at least 1940 as a means to maintain or move closer to parity.

9. If ILECs were allowed to pay the telecom rate for their attachments on FPL's poles, and if FPL were to continue paying the rates negotiated under its joint use agreements with ILECs, FPL and eventually FPL's electric customers would suffer negative financial impacts. If the FCC provides the ILECs with a regulated rate, it could eventually force the electric utility to be the conduit (sole infrastructure provider) for all communication, cable television and perhaps broadband services that the FCC regulates.

10. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 22 day of April, 2008.

A handwritten signature in black ink, appearing to read 'T. Kennedy', is written over a horizontal line.

Thomas J. Kennedy, P.E.
Principal Regulatory Affairs Analyst,
Florida Power & Light Company

EXHIBIT 2

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and)	
Policies Governing Pole Attachments	)	RM-11293
)	
	)	RM-11303

SECOND DECLARATION OF SCOTT FREEBURN

1. My name is Scott Freeburn. I am currently employed by Progress Energy Florida, Inc. ("PEF") as the Manager of Joint Use and Locates. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Manager of Joint Use and Locates for PEF.

2. I am the same Scott Freeburn who offered testimony in support of the initial comments submitted by Florida Power & Light Company, Tampa Electric Company, and Progress Energy Florida, Inc. (collectively, the "Florida IOUs") in the above-captioned matter. I offer this testimony in support of the reply comments filed by The Florida IOUs.

3. PEF does not allow "temporary attachments" on its poles for a variety of reasons. Under the NESC, clearance requirements cannot be waived for temporary attachments anyway. The only requirement that can be temporarily waived is the grade of construction. However, construction grade is one of the critical components to PEF's Storm Hardening Plan approved by the Florida Public Service Commission. A "waiver" of the grade of construction would, in essence, be permission to overload the pole. Further, PEF does not allow temporary attachments

because attachers, once on the pole at all, would have little incentive to spend the money and effort required to make attachments permanent.

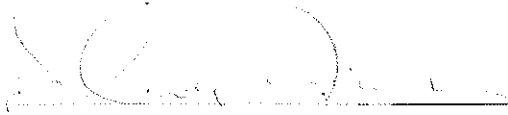
4. During the make-ready process for new attachments, existing attachments often must be rearranged or transferred to a new pole in order to make room for the new attacher. The time required for each make-ready job varies depending on the job's size and complexity. PEF never has had any significant issues with negotiating make-ready timelines with its attachers and it rarely receives complaints about the length of time taken to complete a make-ready job. Based on PEF's dealings with its third-party attachers, make-ready timelines do not seem to be an issue of such concern to warrant regulatory intervention. The real "delay" problem we face in make-ready projects is attachers' failure to transfer their attachments to a new pole, notwithstanding notification through NJUNS. There are currently more than 13,000 stub poles (double wood) in PEF's service territory because of attachers' failure to transfer.

5. The operational problems presented by "boxing" are not solved by use of bucket trucks. Some poles, even if accessible by bucket truck, must be climbed in certain maintenance situations. A "boxed" or "bracketed" pole makes it far more difficult to climb and compromises lineman safety. Operationally, a boxed pole is very difficult to replace due to cables occupying both sides of the pole and will require special equipment such as larger boom trucks or cranes in order to set such a pole.

6. I understand certain attachers are asking that distribution facilities maps be posted on the web for ease of access. In addition to the security and safety concerns presented should this information fall into the wrong hands, it would be against PEF policy for this information to be publicly available. Prior to giving distribution facilities maps to anyone, PEF requires execution of a nondisclosure agreement.

7. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 22nd day of April, 2008.

A handwritten signature in dark ink, appearing to read "Scott Freeburn", is written over a horizontal line.

Scott Freeburn
Manager of Joint Use and Locates
Progress Energy Florida, Inc.

EXHIBIT 3

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and)	
Policies Governing Pole Attachments	)	RM-11293
)	
	)	RM-11303

SECOND DECLARATION OF KRISTINA L. ANGIULLI

1. My name is Kristina ("Kris") Angiulli. I am currently employed by Tampa Electric Company ("TECO") as the Manager of Energy Delivery Construction Services. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Manager of Energy Delivery Construction Services for TECO.

2. I am the same Kris Angiulli who offered testimony in support of the initial comments submitted by Florida Power & Light Company, Tampa Electric Company, and Progress Energy Florida, Inc. (collectively, the "Florida IOUs") in the above-captioned matter. I offer this testimony in support of the reply comments filed by The Florida IOUs.

3. TECO does not make maps of its distribution facilities available to the public because of security risks. TECO does not even allow state or local governments have access to this information. When we do give copies of specific maps (never the entire system) to outside parties, we require execution of a nondisclosure agreement. In accordance with the National Response Framework, the protection of electric infrastructure is considered critical and key to homeland security. Protection of the infrastructure includes taking measures to ensure that the information does not fall into unfriendly hands and result in a grid failure. In addition, NERC

standards mandate securing cyber secure areas. Posting distribution information will put the grid system at risk and electric utilities in a vulnerable security position.

4. To the extent ILECs are concerned about the consequences of an imbalance in ownership of poles, they have the ability to correct this through setting new / replacement poles or through pole buy backs. But, the cost of setting new poles, even for ILECs, is high. TECO and Verizon actually discussed a pole buy back in 2003, but the discussions never progressed because Verizon wanted the benefit of purchasing depreciated poles without the burden of the cost of new poles. Ownership imbalance is an economic choice the ILECs make because it is cheaper for them to pay the adjustment rate than it is for them to own poles.

5. Under TECO's joint use agreement with Verizon, the ILEC does not bear additional costs for larger or stronger poles needed only to suit TECO's service needs. Further, the rate paid by the party out of parity does not change based on the space actually occupied or the number of attachments. Based on my observations, Verizon is using more space today than they were five years ago. As they deploy new services, they do not replace existing lines – they just add new ones (either as a new attachment or as an overlash to the existing attachment; either way, they are “using” more of the pole).

6. The photographs attached hereto show standoff brackets installed on TECO poles, without authorization, which were recently discovered. As the pictures show, these brackets are a “magnet” for numerous attachments.

7. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 22nd day of April, 2008.



Kristina L. Anguilli
Manager, Energy Delivery Construction Services
Tampa Electric Company

ATTACHMENT A

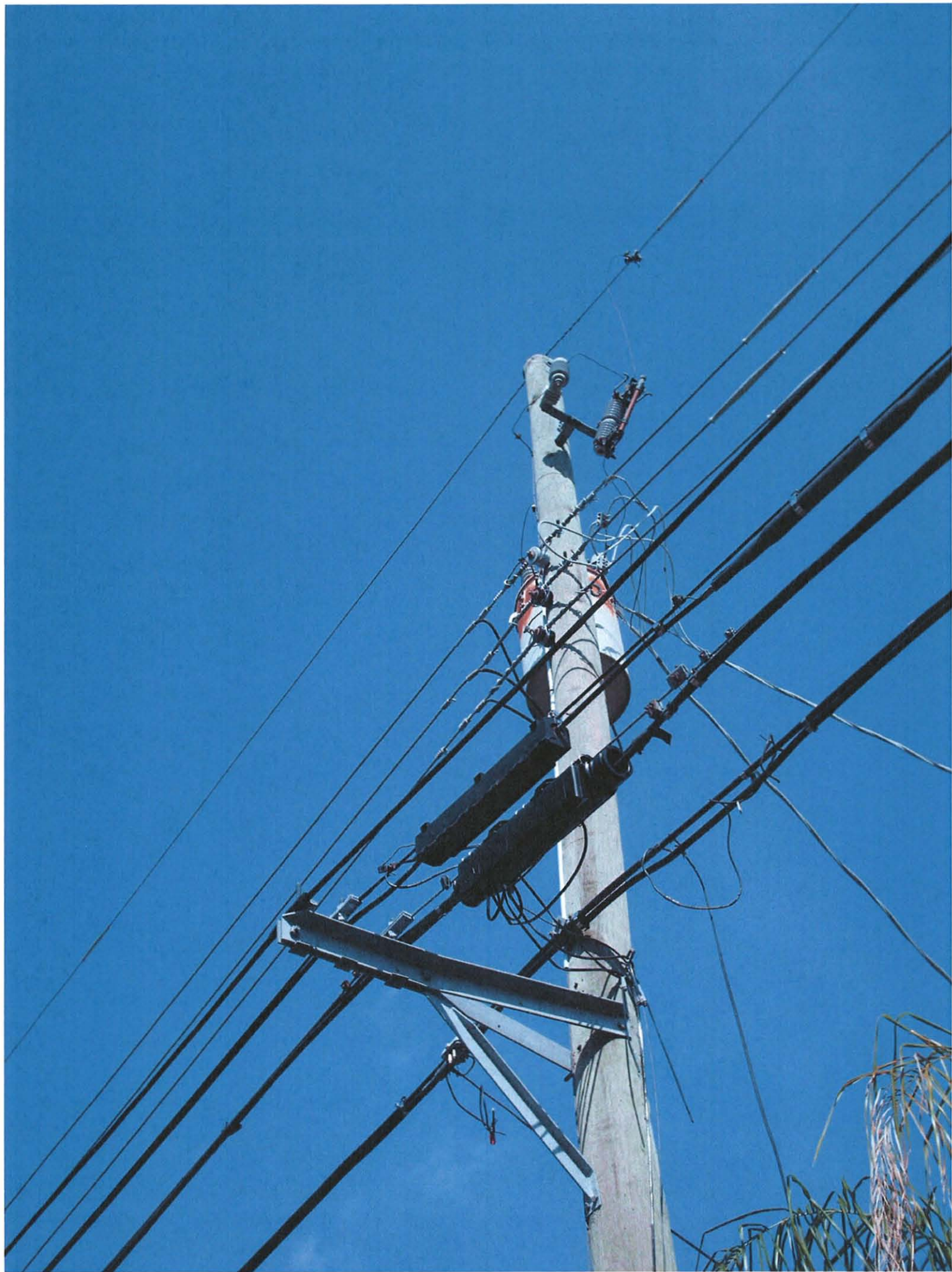




EXHIBIT 4

Transcript of:

Date: April 26, 2006

Volume: 8

Case: Florida Cable Telecommunications v. Gulf Power Company

Neal R. Gross & Co., Inc.
Phone: 202-234-4433
Fax: 202-387-7330
Email: info@nealrgross.com
Internet: www.nealrgross.com

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF) EB Docket No.
)
) 04-381
FLORIDA CABLE TELECOMMUNICATIONS)
ASSOCIATION, INC.; COMCAST)
CABLEVISION OF PANAMA CITY, INC.;)
MEDIACOM SOUTHEAST, L.C.C.; and)
COX COMMUNICATIONS GULF, L.C.C.,)
)
Complainants,)
)
v.)
)
GULF POWER COMPANY,)
)
Respondent.)

Federal Communications
Commission
Hearing Room A, TW A-363
Washington, D.C.

VOLUME 8

Wednesday,
April 26, 2006
9:00 a.m.

BEFORE :

RICHARD L. SIPPEL
Chief Administrative Law Judge

1 A Well, my testimony in this proceeding is
2 in regard to the cable rate formula, but certainly the
3 telecom formula is also included in section 224.

4 Q Do you also agree that the telecom formula
5 reflects economically appropriate cost allocation
6 principles?

7 A Yes.

8 Q And you are aware, Ms. Kravtin, that the
9 telecom rate differs somewhat from the cable rate?

10 A Yes, I'm well aware of that.

11 Q And you are aware that the key distinction
12 between the two is that the telecom rate allocates the
13 unusable space equally among the attachers to the
14 pole?

15 A I don't know if I would characterize it
16 that way. I view the two formulas as having different
17 space allocation methodologies for allocating both the
18 usable and unusable space of the pole. Both formulas
19 allocate the usable and unusable space at the pole,
20 but according to a different space allocator
21 methodology.

22 Q But the way the telecom rate allocates

1 unusable space is economically appropriate?

2 A I think I just explained in my prior
3 answer that I didn't agree with the way you're
4 describing the allocation of usable space. There are
5 three parts to both formulas: the investment, the
6 carrying charge, and the space allocator. So where
7 the two formulas differ is in terms of the space
8 factor allocation, the method by which they are
9 allocating the entirety of the pole to either a cable
10 company or a telecom company.

11 Q And right now I'm asking you about the
12 space allocation factor in the telecom rate.

13 A Yes.

14 Q Is that economically appropriate?

15 MR. SEIVER: I'm sorry. For what purpose?
16 Objection. "Economically appropriate" in the world or
17 --

18 MR. LANGLEY: Well, this is her testimony.
19 I'm just asking her questions --

20 JUDGE SIPPEL: Well, I'm going to overrule
21 the objection at this point. The witness hasn't
22 indicated that she is having difficulty answering

1 these questions. So, you know, I mean you raised some
2 excellent objections, And I think they have been
3 sustained, but let's see what we can do here.

4 BY MR. LANGLEY:

5 Q Ms. Kravtin, is the way the telecom
6 formula allocates unusable space an economically
7 appropriate cost allocation principle?

8 A I think this is now the third time. The
9 way you are asking me the question, I am not able to
10 answer it because I don't view the telecommunications
11 formula as allocating unusable space different in
12 terms of -- the space factor allocator is different,
13 but both the cable formula and telecom formula
14 allocate the cost of the total pole, including usable
15 and unusable space.

16 Now if you ask me in terms of what I
17 believe about the space factor allocator in particular
18 and the methodology used in that, then I will try to
19 answer your question.

20 Q That was my question, Ms. Kravtin.

21 A I'm sorry, that's not the way I heard it.
22 I apologize.

1 Q Is the space allocation factor in the
2 telecom formula an -- does it reflect economically
3 appropriate cost allocation principles?

4 A Again I testified to, and we had this
5 discussion in deposition, I have testified to this on
6 numerous occasions actually where I have testified on
7 both the use of the telecom formula or the cable
8 formula, is that I believe the appropriate cost
9 allocation principle is to allocate based on usage of
10 the pole.

11 Now the telecom formula applies a slightly
12 different methodology in the sense that it does
13 include an allocation -- coming up the space
14 allocator, it includes in that allocation factor some
15 portions, two-thirds of the unusable space divided
16 over the number of attachers. So it's just a
17 different formula of trying to allocate the total cost
18 of the poles. And I believe that a strict usage-based
19 allocator -- again, we are not talking about what the
20 total costs that are being allocated; we are talking
21 about the design of the allocator. I've testified
22 that a strict usage-based allocator is most consistent

1 with cost-causation principles.

2 In an appropriate world, you know, all the
3 attachers would be charged using a strictly usage-
4 based formula, which is in the cable rate.

5 I also understand that in the more complex
6 real world and in the context of the
7 Telecommunications Act, where Congress was looking to
8 go to a different paradigm, where there are multiple
9 attachers and trying to encourage telecom competition
10 and all that, whatever, that, you know, they augmented
11 the cable formula to be a little different in the case
12 of telecom. But I believe that the telecom formula
13 generally is more consistent with cost-causation
14 principles than, for example, Gulf's replacement cost
15 methodology, which is producing a rate some 10 times
16 greater than the cable rate.

17 Certainly the differences between the
18 cable rate and the telecom rate are relatively small
19 compared with these other alternatives. And that is
20 consistent with what I've testified here and what we
21 discussed in deposition, but also other cases where I
22 have testified on the telecom rate and the use of the

1 telecom rate to telecom carriers.

2 Q Is that it? Is that the end of your
3 answer?

4 A Yes.

5 Q Do you need to change your testimony then
6 on page 15 of your prefiled written direct?

7 MR. SEIVER: Objection, Your Honor.

8 JUDGE SIPPEL: Sustained. No -- I mean I
9 overrule the objection. Go ahead. Go ahead, Mr.
10 Langley.

11 BY MR. LANGLEY:

12 Q Ms. Kravtin, do you need to change your
13 testimony on paragraph 15 of your direct?

14 A I do not because I testified that I do
15 believe a telecommunications formula is consistent
16 with cost-causation principles. You in your question
17 narrowed me to that space factor allocator. And which
18 I said again is, you know, a matter of degrees, that
19 I believe that a pure space allocator based on sheer
20 usage, straight usage, as in the cable formula, was
21 most consistent with cost causation, but that
22 generally a telecom formula still produced a rate that